No. 439

Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

v.

AETNA FREIGHT LINES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Boiled down to essentials, respondent's Brief rests on three erroneous claims.

1. Respondent asserts that Interrogatory 1 presented the entire Compensation Act issue for jury determination. Interrogatory 1 referred to protection of the "defendant's interests." These words—"defendant's interests"—are said to have the same meaning as the "regular course of the business" of respondent. Indeed, respondent states, at p. 17 of its Brief, that to deny that this is just another way of saying the same thing, is "a play on words."

Respondent must be painfully aware that it can hardly claim that the jury has decided the Compensation Act issue in *respondent's* favor when the jury re-

turned a verdict for *petitioner*, and when respondent neither sought nor obtained an instruction on the essential element of its secondary defense. Even if Ormsbee served as respondent's employee, rather than as Fidler's, petitioner's cause of action is not defeated unless Ormsbee was its employee "in the regular course of the business." So, if the *jury* was to make the essential determination, this statutory language should have been presented and explained to the fact-finder. And obviously the party relying on the Compensation Act to defeat the cause of action must seek the needed jury instruction. *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

Since the jury never heard of the Compensation Act as a ground for defeating the cause of action, and never heard of the statutory language "regular course of the business," respondent now searches for a substitute. The substitute chosen is the words "defendant's interests," which appeared in Interrogatory 1.

This is indeed a new statutory test for "regular course of the business." Under this suggestion, anything that serves the employer's "interests" is in the regular course of his business. Of course there is no support for this interpretation in the decision of the court below, and none in the decisions of the Pennsylvania courts. If everything that furthered the employer's "interests" were in "regular course," what would be excluded?

In *Callihan* v. *Montgomery*, 272 Pa. 56, 115 Atl. 889 (1922), relied on by the court below, the necessary repair of machinery was held not to be in the regular course of business. Was not this repair in the "interests" of the employer? The court recognized the obvious fact that this repair work was essential, but concluded it was not in the regular course of the business.

Ciccocioppo v. *Rocco*, 172 Pa. Super. 315, 94 A.2d 77 (1953), similarly relied on by the court below, involved necessary repairs to defendant's restaurant ceiling. Such repairs were held not to be in the regular course of defendant's business. Yet these repairs were in defendant's "interests." And in *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939), the removal of an injured employee from the power lines by an emergency employee was held not in regular course, though obviously in the employer's interest, since this made possible the restoration of electric current.

No one, as far as an examination of the Pennsylvania cases reveals, has heretofore even suggested an equivalency between what is in the employer's interests and what is in "regular course of the business." Respondent can find no comfort in Interrogatory 1 in concluding that there was presented to the jury the question of "regular course."

The Court of Appeals made no claim that the issue of regular course of business had been presented for a jury determination, but decided the question as one of law. Respondent made no such claim in opposing certiorari, and the absence of such a claim was duly noted in petitioner's Reply Brief, at p. 2. This presumably has spurred respondent's present effort to supply the omission.

2. Throughout its Brief (*e.g.*, pp. 16, 23, 25), respondent asserts that there was "no dispute" as to Ormsbee's employment status. It is asserted that petitioner somehow freely conceded that respondent was Ormsbee's employer, and that the employment was in "regular course." This is an amazing and wholly tortured contention. Only the persistence with which it is advanced necessitates a brief rebuttal.

While the claim of "no dispute" is advanced to brush Fidler aside as the employer, it is advanced most ardently to justify the failure of respondent to seek a jury determination on the issue of "regular course of the business." The claim of "no dispute" is also used to create the impression that petitioner first raised this issue in this Court. Respondent's argument includes a wholly erroneous interpretation, at p. 16 of its Brief, of what petitioner's trial counsel stated to the trial judge as to "ordinary conduct" of the employer's business. Respondent's argument reaches its crescendo, at p. 25 of its Brief, when it categorically asserts that in the courts below, "*Petitioner never once contested regular course of business,*" and petitioner "now argue[s] (*for the first time*) that regular course of business of Respondent was in dispute."

If the issue was not disputed below, why did the Court of Appeals have to rule on the question? Petitioner's brief in the court below summarized his position on Workmen's Compensation as consisting of three points. The first was that Fidler, or Schroyer as Fidler's agent, was the employer; the third was that "Ormsbee's employment was casual and not in the *regular* course of Aetna's business."[1] These points were then fully argued by petitioner. Unlike here, respondent below made no claim that the employment status point was not in dispute. It acknowledged petitioner's position—which it now asserts was never advanced—by this summary statement in its brief below: "*Plaintiff contends that Ormsbee's employment was not in the regular course of defendant Aetna's business. . . .*"[2]

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[1] Brief for Appellee in Court of Appeals, pp. 14-15.

[2] Reply Brief for Appellant in Court of Appeals, p. 3.

Respondent, at pp. 15-16 of its Brief, quotes the record at R. 166a as showing petitioner's purported agreement that Ormsbee's employment was in the "ordinary conduct" of respondent's business. In fact, the record shows exactly the opposite. The Compensation Act issue was being discussed with the court. Mr. Knox, counsel for petitioner, referred to a "casual helper," which was a reference to the language of Section 104 of the Act. R. 166a. After counsel for respondent advised the court that emergency employees were covered by the Compensation Act, Mr. Gornall, also counsel for petitioner, added the qualification that the employee had to be engaged "in the ordinary conduct of his business." "Ordinary" means "regular" under the established decisions interpreting Section 104 of the Act. Thus Mr. Gornall was raising the same contention that respondent asserts was urged for the first time in this Court.

Understanding of this case is not furthered by an erroneous repetition of the theme that petitioner conceded that which respondent reserved for the court's consideration, rather than the jury's. Respondent says nothing of the testimony of its own regional manager that *Fidler* was Schroyer's "boss" (R. 64a). This admission by a witness apparently is not considered a concession, for throughout its Brief it systematically refers to Schroyer as "respondent's driver." Rather than deal with the facts, respondent simply asserts there was "no dispute," and fortifies this approach by assuming that all the facts were resolved in its favor.

3. Finally, respondent endeavors to escape *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, by claiming that the Court of Appeals merely accepted the jury's finding, and then applied the law.

Respondent makes no effort to explain why the Court of Appeals relied on SKINNER, a treatise on the Pennsylvania Workmen's Compensation Act, and a supporting Pennsylvania decision in determining the scope of review. This reliance was hardly necessary if all facts and inferences were already determined below by the jury. Respondent offers no explanation for the court's reliance on state practice.

The Court of Appeals did approve the jury finding that there was an emergency situation and that Ormsbee was consequently not a trespasser. R. 231. But the evidence would certainly have permitted a jury inference that Ormsbee's functions, which were in respondent's interests so that he was not a trespasser as to it, were to be performed for Fidler, who maintained his own equipment now on the verge of breaking down. Moreover, as we have seen, the evidence would have supported the inference that Ormsbee's employment was not in "regular course."

This Court on April 6, 1959, in deciding *Baker* v. *Texas and Pacific Railway Co.*, No. 363, Oct. T. 1958, held that the issue of who is an "employee," or "employed," should be submitted to the jury because it "contains factual elements," just "like that of fault or of causation." See also petitioner's main Brief, p. 17, for similar precedents.

The court below resolved factual elements on which reasonable men could differ. It did so in reliance on state practice. It did so although the jury had never been advised that the Compensation Act was being relied on by respondent to block recovery—*and even though the jury had never been instructed on the applicable standard,* a procedure which would be elementary under the federal practice of submitting the issue to the jury.

Respondent had adequate strategic reasons for the posture in which it left its defense before the jury. It cannot seek to relitigate the matter now. *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

CONCLUSION

For the foregoing reasons the petitioner prays that the judgment below be reversed and the jury verdict reinstated.

Respectfully submitted,

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